Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of Review of Commission Consideration of Applications under the Cable Landing License Act	IB Docket No. 00-106

COMMENTS OF TYCOM NETWORKS (US) INC.

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SUMMARY

TyCom Networks (US) Inc. ("TyCom"), formerly known as Tyco Submarine Systems Ltd., strongly supports the Commission's objective of streamlining its licensing process for submarine cables. TyCom is a subsidiary of TyCom Ltd., one the world's leading integrated suppliers of undersea communication systems and services, and the developer of the world's most extensive and most advanced global undersea telecommunications fiber-optic network, the TyCom™ Global Network. TyCom has a strong interest in ensuring that the Commission continues to foster competition in the market for undersea cable systems and system capacity. By streamlining and simplifying the regulation of submarine cables, the Commission would further enable infrastructure investment to meet ever-increasing consumer demand for bandwidth capacity.

In its comments, TyCom addresses five sets of issues relating to the Commission's proposals. *First*, TyCom urges the Commission to adopt a simplified streamlining option, which would inquire whether or not a controlling owner of a submarine cable had market power (directly or indirectly through an affiliate) in a destination market for that cable. *Second*, TyCom supports the Commission's private submarine cable policy and notes that federal law requires the Commission to apply common carrier regulation to certain submarine cables. *Third*, TyCom recommends that the Commission apply limited standard conditions by rule, and limit all other conditions to avoid interference with the strategic and commercial decisions of submarine cable owners. *Fourth*, TyCom recommends that the Commission require as applicants only those entities necessary to ensure compliance with the terms and conditions of a cable landing license. *Fifth*, TyCom urges the Commission to consult further with the other Executive Branch agencies to expedite consideration of cable landing license applications.

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TyCom Networks (US) Inc. ("TyCom"), formerly known as Tyco Submarine Systems Ltd., strongly supports the Commission's objective of streamlining the licensing process for submarine cables.[1] TyCom is a subsidiary of TyCom Ltd., one the world's leading integrated suppliers of undersea communication systems and services and the only such U.S.-based supplier. TyCom Ltd. is also developing the world's most extensive and most advanced global undersea telecommunications fiber-optic network, the TyCom™ Global Network. TyCom has a strong interest in ensuring that the Commission continues to foster competition in the market for undersea cable systems and system capacity. By reducing the regulatory burden for the construction and operation of submarine cable systems while promoting competition among facilities providers, the Commission would further encourage investment in the cable systems that TyCom builds and

[1] *See Review of Commission Consideration of Applications under the Cable Landing License Act, Notice of Proposed Rulemaking*, FCC 00-210 (rel. June 22, 2000) ("NPRM").

maintains. The Commission would also ensure that cable system operators and carriers—including TyCom and its customers—can meet consumers' ferocious demand for bandwidth to support a variety of international services.

TyCom designs, manufactures, installs, and maintains undersea cable systems; its annual revenues from these activities exceed $1 billion. Operating a modern fleet of cable ships stationed around the world, TyCom has successfully installed over 300,000 kilometers of undersea communications systems. In addition to the TyCom Global Network (including the TyCom Atlantic and TyCom Pacific cable systems), TyCom is currently involved in the Alaska United, Americas-II, ARCOS-1, Atlantic Crossing-1, Australia-Japan, Black Sea, C2C Network, China-U.S., Columbus-III, FLAG, Guam-Philippines, Hibernia, Level 3 / Yellow, Maya-1, Pacific Crossing-1, Pan American Crossing, Petrobras, SAm-1, SEA-ME-WE 3, TAT-12/13 Upgrade, and TPC-5 Upgrade submarine cable projects.

In its comments, TyCom addresses five sets of issues relating to the Commission's proposals. *First*, TyCom urges the Commission to adopt a simplified streamlining option. *Second*, TyCom supports the Commission's private submarine cable policy and notes that federal law requires the Commission to apply common carrier regulation to certain submarine cables. *Third*, TyCom recommends that the Commission apply limited standard conditions by rule, and limit all other conditions to avoid interference with the strategic and comical decisions of submarine cable owners. *Fourth*, TyCom recommends that the Commission require as applicants only those entities necessary to ensure compliance with the terms and conditions of a cable landing license. *Fifth*, TyCom urges the Commission to consult further with the other Executive Branch agencies to expedite consideration of cable landing license applications.

I. THE COMMISSION SHOULD ADOPT A SIMPLIFIED STREAMLINING OPTION

To license submarine cables more expeditiously under the Cable Landing License Act,[2] the Commission should adopt a simplified streamlining option. Although the Commission has in its NPRM taken a thoughtful and thorough approach, TyCom remains concerned that the Commission's streamlining proposals are elaborate, and that may not serve the Commission's streamlining objectives in their application. The complexity of these proposals, if adopted, could actually lengthen—rather than reduce—application processing times. This complexity also risks shifting the Commission's focus away from consideration of whether and on what terms to grant a license, and instead focus the Commission's efforts on the procedure by which the application is to be considered. Indeed, the proposals seem to combine the issues of how to process the application and whether or not to impose common carrier regulation. To further its streamlining objectives, the Commission should instead adopt a single bright-line rule—one that would be easily applied based on readily available information that is difficult to dispute.

A. Simplified Streamlining Would Inquire Whether or Not a Controlling Owner of a Submarine Cable Had Market Power (Directly or Indirectly Through an Affiliate) in a Destination Market for that Cable

The Commission should adopt a simplified streamlining approach that would inquire whether or not a controlling owner of a submarine cable had market power (directly or indirectly through an affiliate) in a destination market where that cable lands. This approach would address the Commission's key concern: the use of market power in a destination market in conjunction

[2] *See* "An act relating to the Landing and Operation of Submarine Cables in the United States," *codified at* 47 U.S.C. §§ 34-39 ("Cable Landing License Act").

with control over capacity, interconnection, and backhaul to threaten competition in the provision of international services.

Under such a simplified streamlining approach, the Commission staff could easily determine whether or not a given application was eligible for streamlining. *First*, the Commission already requires submission of detailed ownership and affiliation information in the application for a cable landing license. This includes information on the ownership, by segment, of the submarine cable and of the cable landing stations.[3] *Second*, the Commission already maintains a listing of carriers having market power in markets around the world.[4]

B. The Commission's Streamlining Proposals Could Be Difficult to Administer and Might Delay the Processing of Applications

By contrast, the Commission's current streamlining proposals could be difficult to administer and might delay the processing of cable landing license applications. Each of the three options contains exceptions, making application of any streamlining rules more complex, time-consuming, and possibly contentious. These streamlining proposals also do not yet account for how submarine cable capacity is increasingly sold.

Relationship to Common Carrier Regulation. The concerns that would preclude streamlining of a cable landing license application—particularly a lack of alternative facilities on a route or in a region[5]—are the very concerns which the Commission must examine in deciding whether or not to impose common carrier regulation on a submarine cable. As discussed in part III

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3 *See* 47 C.F.R. § 1.767.

4 *See* List of Foreign Telecommunications Carriers that are Presumed to Possess Market Power in Foreign Telecommunications Markets, <http://www.fcc.gov/Bureaus/International/Public_Notices/1999/da990809.txt>.

5 NPRM ¶ 28.

below, these concerns are difficult to address with bright-line rules, as they are case-specific and fact intensive. As noted in the NPRM, the Commission would require many exceptions to address these concerns by rule. The Commission should instead leave these concerns as part of its analysis of regulatory classification—common carrier or non-common carrier—and refrain from applying that substantive analysis as part of its application processing rules.

Delay in Acceptance for Filing. TyCom is concerned that complicated application processing rules—such as the Commission's streamlining proposals—could delay the forwarding of cable landing license applications for interagency review. As discussed in part V below, the interagency review process already contributes to the delay in granting cable landing licenses. At present, the Commission typically notifies the State Department of a cable landing license application around the same time at which the application is placed on public notice. But under the Commission's current proposals, a cable landing license application would have to be accepted for filing either on a streamlined or non-streamlined basis by public notice, much like Section 214 applications. And given the complexity of the Commission's current streamlining proposals, presumably it would take substantially more time to make this streamlining determination with respect to cable landing license applications than it would for Section 214 applications. Ultimately, this could delay the forwarding of the application to the State Department for interagency review.

Ring-Configuration Systems. The Commission's streamlining proposals do not yet account for the manner in which capacity on submarine cables is increasingly sold. In particular, the "competitive route" option does not account for the manner in which capacity is sold on ring-

configuration systems that connect three or more countries.[6] Rather than sell capacity on specific country-pair routes (*e.g.*, the United States-United Kingdom route), these systems sell set units of capacity for the entire ring system , so that customers may use that given amount of capacity between any and all termination points on ring.[7] While it might still be possible to analyze the competitive effects of a ring system in terms of country-pair routes, it would not make sense to impose route-specific conditions, as these conditions would have to be imposed on the entire ring system and all of its possible routes. Moreover, any attempt to impose route-specific conditions could skew the business plan of a ring system that sought to sell capacity in that manner.

Regulation of Ownership Structure. Certain aspects of the Commission's "competitive capacity" option may be unnecessary. In particular, the Commission should reject Global Crossing's proposal to create regulatory distinctions based on the nature of a submarine cable's ownership structure.[8] Consortium cables—to which Global Crossing objects most strenuously—are by their very nature cumbersome. In TyCom's experience as a supplier of submarine cables systems for owners with various ownership structures—all of whom it welcomes as customers—consortium cables are increasingly disfavored by carriers themselves. Typically, consortium cable owners act by consensus or committee in some form, and they act and adapt more slowly with respect to management, marketing, and technology than do their non-consortium counterparts. As a result, consortium cables are deployed more slowly and with less capacity than their non-

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6 *See id.* ¶¶ 25-32.

7 *See, e.g.*, Application of Telefónica SAM USA, Inc. and Telefónica SAM de Puerto Rico, Inc. for a Cable Landing License, File No. SCL-LIC-20000204-00003, at 4, 16-17 ("SAm-1 Application").

8 *See* NPRM ¶ 37.

consortium counterparts because they must account for the demands of their multiple owners, who often disagree on the particulars. The Commission therefore need not adopt rules with respect to ownership structures, as such rules would only confirm a market trend.

II. THE COMMISSION SHOULD PRESERVE ITS CURRENT REGULATORY CLASSIFICATIONS

TyCom supports the Commission's proposal to continue its private submarine cable policy while preserving the distinction between common carrier and non-common carrier submarine cables.[9] This approach satisfies the applicable statutory requirements while working reasonably well to address the needs of the applicants, their customers, and U.S. consumers. In deciding when to apply common carrier regulation, the Commission is compelled to apply the *NARUC I* test.

A. The Commission Should Continue to Apply Its Private Submarine Cable Policy With Minimal Licensing Conditions

TyCom strongly supports the Commission's endorsement of its private submarine cable policy, which has produced substantial public interest benefits since it was first adopted in 1985.[10] At that time, the Commission drew an analogy between its private cable policy and its policy of allowing the private sale of domestic satellite transponders, noting that the operation and sale of capacity on a non-common carrier cable

> would (1) permit the providers of capacity to make tailored and flexible arrangements with customers that are not possible under the regimen of a tariffed service offering, (2) enable customers to make long-term plans for the use of facilities with assurance as to facility availability and price, (3) permit systems to be specifically

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9 *See id.* ¶ 69.

10 *See id.; Tel-Optik Ltd.*, 100 FCC 2d 1033 (1985).

> designed to customer needs, and (4) result in positive market development for new and innovative service offerings.[11]

The great virtue of the Commission's private submarine cable policy is flexibility. But by mandating—or granting more favorable regulatory treatment or processing for—specific terms and conditions in construction, maintenance, and administration ("CM&A") and indefeasible-right-of-use ("IRU") agreements, and by specifying that particular carriers have access to capacity for a given submarine cable system,[12] the Commission threatens to reduce that flexibility.[13] Not only does this reduced flexibility skew the business plan of a submarine cable operator, it threatens to deter infrastructure investment itself. Obviously, the Commission should regulate to ensure competition and infrastructure build-out, but it should also enable a submarine cable owner to structure its operations and offering to earn a return on its investment—the very incentive for building a facility in the first place.

B. The Communications Act of 1934 and the *NARUC I* Test Compel the Commission to Impose Common Carrier Regulation on Certain Submarine Cables

While the Commission's private submarine cable policy is legally proper, the Commission still has a legal obligation to regulate certain submarine cables as common carrier facilities. The Cable Landing License Act itself makes no distinction between, much less a mention of, common carrier and non-common carrier submarine cables, and requires only that the President issue a

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11 *Id.* at 1041.

12 *See* NPRM ¶¶ 46-50.

13 *Tel-Optik*, 100 FCC 2d at 1051 (noting that "[i]t shall be this Commission's policy that any such private systems succeed or fail on their own merits and not through Commission action that would guarantee common carrier use of the systems."). *See also* NPRM ¶¶ 40-50.

written license before a submarine cable may be landed or operated in the United States.[14] But the Communications Act of 1934, as amended ("Communications Act"), requires the FCC to regulate common carrier facilities, including new lines, as common carrier facilities (the tautology appearing in the text of the Communications Act itself).[15] The courts have interpreted this to mean the Commission must apply common carrier regulation to a carrier that offers its services indifferently to the user public (or a subset thereof) for a fee, or where there is a legal compulsion or other public interest reason for imposing such regulation.[16] Unless the Commission finds that it is compelled to forbear from common carrier regulation of submarine cables (an issue discussed in part II.C below), it must continue to regulate submarine cables as common carrier facilities pursuant to these statutory and judicial requirements.

In applying the "indifferent holding out" prong of the *NARUC I* test for common carriage, the Commission should continue to look only at the nature of the carrier's offering, not at the nature

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14 47 U.S.C. § 34.

15 *See* 47 U.S.C. § 153 (defining "common carrier" and "carrier" both to mean "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio"), § 214(a) (stating that "[n]o carrier shall undertake the construction of a new line, or of an extension of an existing line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line").

16 *See National Ass'n of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630, 641 (D.C. Cir.) ("*NARUC I*") (stating that the court must inquire "whether there are reasons implicit in the nature of . . . [the] operations to expect an indifferent holding out to the eligible user public"), *cert. denied* 425 U.S. 992 (1976); *Virgin Island Telephone Corp. v. FCC*, 198 F.3d 921 (D.C. Cir. 1999) (affirming the Commission's use of the *NARUC I* test to distinguish common carrier and private carrier services following the adoption of the Telecommunications Act of 1996).

of its customers or their subsequent offerings.[17] By conveying bulk cable capacity, a submarine cable owner "is not providing a service that is effectively available to the public."[18]

In applying the "legal compulsion or public interest" prong of the *NARUC I* test, the Commission should continue to consider whether or not the applicant has sufficient market power to warrant common carrier regulation.[19] To make this determination, the Commission should continue to examine whether or not there are adequate alternative facilities on the route, including common carrier submarine cables,[20] non-common carrier submarine cables,[21] planned but unbuilt submarine cables,[22] cables that provide connectivity without landing in the United States,[23] and

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17 *See AT&T et al., Cable Landing License*, 14 FCC Rcd. 1923, 1928 (Int'l Bur. 1998) ("*Guam Philippines Cable Order*") (noting that "[t]he fact that most of the initial owners of capacity are themselves common carriers does not change this analysis" that the system would operate on a non-common carrier basis), *application for review pending*.

18 *AT&T Submarine Systems, Inc.*, 11 FCC Rcd. 14,885, 14,892, 14,904 (Int'l Bureau 1996) ("*St. Thomas-St. Croix Cable Order*") (finding that an "offer of access, nondiscriminatory terms and conditions and market pricing of IRUs does not rise to the level of an 'indiscriminate offering'" so as to constitute common carriage), *aff'd* 13 FCC Rcd. 21,585 (1998), *aff'd sub. nom Virgin Islands Telephone Corp. v. FCC*, 198 F.3d 921 (D.C. Cir. 1999).

19 *St. Thomas-St. Croix Cable Order*, 11 FCC Rcd. at 14,893, 14,898 (finding that the availability of existing alternative facilities makes it "uneconomic" for the applicant to "deny access" or "charge monopoly rates," particularly for a high-capacity system, where the applicant "has an incentive to offer competitive prices to attract customers to use its capacity (and therefore protect its sunk capital investment).").

20 *See Optel Communications, Inc.*, 8 FCC Rcd. 2267, 2269 (Com. Car. Bur. 1993); *Transnational Telecom Ltd.*, 5 FCC Rcd. 598, 599 (Com. Car. Bur. 1990); *Pacific Telecom Cable, Inc.*, 2 FCC Rcd. 2686, 2687 (Com. Car. Bur. 1987).

21 *See Telefónica SAM USA Inc., Cable Landing License*, DA 00-1826, ¶ 15 (Int'l Bur., rel. Aug. 10, 2000) ("*SAm-1 Order*"); *Worldwide Telecom (USA) Inc., Cable Landing License*, 15 FCC Rcd. 765, 768 (Int'l Bur. 2000) (authorizing the Hibernia cable system).

22 *See AT&T Corp. et. al, Cable Landing License*, 13 FCC Rcd. 16,232, 16,237 (Int'l Bureau 1998) (noting that the planned PC-1 cable system will provide alternative facilities to the China-U.S. Cable Network); *TeleBermuda International, L.L.C.*, 11 FCC Rcd. 21,141, 21,145 (1996) (noting that the then-planned CANUS-1 Bermuda spur and CSCI cable systems would provide competitive alternative facilities to the BUS-1 cable system).

satellite circuits.[24] With respect to satellite facilities in particular, the Commission has noted the benefits of intermodal competition.[25]

The Commission should not limit—as the NPRM suggests in relation to the "competitive route" option, as a surrogate for common carrier regulation—its consideration of alternative facilities to those to be constructed within 36 months.[26] While a three-year time period seems generous, it is also arbitrary, bearing little relation to the actual effects of competition and failing to account for interim changes in demand on the route or in the region. Likewise, neither should the Commission consider that alternative facilities are sufficiently available only if there are three independently controlled cables on a particular route.[27] Many routes and regions would not support three separate submarine cable systems, depriving those routes and regions of private

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[Footnote continued from previous page]

[23] *See, e.g., Guam-Philippines Cable* Order, 14 FCC Rcd. at 1927 (noting that the APCN cable system—which does not land in the United States—would provide alternative competing facilities for the Guam-Philippines Cable System); *Orient Express Communications, L.L.C.*, 11 FCC Rcd. 16306, 16309 n.9 (Int'l Bur. 1996) (noting that APCN and the HJK cable system—neither or which lands in the United States—each would provide alternative competing facilities for the Orient Express Cable System).

[24] *See SSI Atlantic Crossing LLC*, 13 FCC 5961, 5963 & n.12 (Int'l Bur. 1997) (noting that Intelsat satellite circuits will provide competitive alternative facilities to the Atlantic Crossing cable system), *modified*, 12 FCC Rcd. 17,435 (Int'l Bur. 1997), *further modified*, 13 FCC Rcd. 7171 (Int'l Bur. 1998); *TeleBermuda International, L.L.C.*, 11 FCC Rcd. 21,141, 21,145 & n.14 (1996) (noting that Intelsat satellite circuits will provide the only alternative common carrier facilities to the BUS-1 cable system); *Tel-Optik Ltd.*, 100 FCC 2d 1033, 1041 (1985) (noting that with a private cable system, "[b]ulk users of broadband and high-speed digital satellite circuits will be able to use cable to satisfy their transmission capacity needs and any special operational and technical requirements").

[25] *See Tel-Optik*, 100 FCC 2d at 1040, 1052. It appears that the International Bureau no longer considers alternative satellite facilities in assessing market power, as evidenced in recent licensing decisions. *See, e.g., SAm-1 Order*, ¶ 15; SAm-1 Application, at 6-7 n.7.

[26] *See* NPRM ¶ 28.

[27] *See id.*

cable systems (or delaying the licensing and build-out of such systems by rendering them ineligible for streamlined processing under the "competitive route" option). To accommodate the Commission's concerns about infrastructure build-out on "thin routes" and "underserved regions," the Commission would have to create exceptions that could swallow the rule.[28] Moreover, this route-based approach would not account for the competitive impact of regional connectivity. And the proposal to consider petitions to declare certain routes competitive could skew the specific build-out of infrastructure in a given region, without altering competition.[29]

The Commission should continue its consideration of all current and planned facilities in determining market power. Even if they do not all serve the exact same route, provide the same functionality (*e.g.*, voice, data, video, or Internet), or provide the same quality of service, all of these alternatives still exert price pressure on capacity for a given submarine cable and give the owners an incentive to improve its service. For these reasons, the Commission's proposal of a regional route analysis is a sensible one, although it should be applied in the context of determining a submarine cable's regulatory status, rather than a processing classification by the Commission. Regional connectivity serves to apply pricing and service quality pressures beyond an exact route.

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[28] *See id.* ¶ 31.

[29] *See id.* ¶ 32.

C. The Case for Forbearing from Common Carrier Regulation of Submarine Cables Has Not Yet Been Made

The Commission might eventually conclude that its forbearance authority requires that it refrain from regulating submarine cables as common carrier facilities.[30] Forbearance from common carrier regulation of submarine cables would still satisfy the requirements of the Cable Landing License Act, the requirements of which the Commission has no authority to forbear.[31] But neither no one has yet made a compelling case that the Commission could satisfy the three-part test for forbearance. Indeed, the concerns raised in the NPRM itself would make it difficult from the Commission to conclude in all cases that "enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory."[32] Nevertheless, the Commission should not rule out the possibility of future forbearance as competition and infrastructure build-out progress.

III. THE COMMISSION SHOULD APPLY LIMITED, STANDARD CONDITIONS BY RULE, AND LIMIT ITS IMPOSITION OF OTHER CONDITIONS

In considering licensing conditions, the Commission should adopt its proposal to apply limited, standard conditions by rule. In applying other conditions—preferably on a case-specific basis to minimize the burden on all licensees—the Commission should strive not to interfere with the strategic and commercial decisions of submarine cable owners.

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30 See 47 U.S.C. § 160(a)(1)-(3) (setting forth three-part test for forbearance).

31 *See 1998 Biennial Regulatory Review—Review of International Common Carrier Regulations, Notice of Proposed Rulemaking*, 14 FCC Rcd. 4909, 4923 (1998).

32 47 U.S.C. § 160(a)(1).

Standard Conditions and Acceptance Letter. TyCom supports the Commission's proposal to apply limited, standard licensing conditions by rule.[33] Neither the conditions themselves nor the requirement that successful applicants submit a license acceptance letter is particularly burdensome. But the acceptance letter requirement generates unnecessary paper for the Commission. Instead, the Commission should require only that applicants certify in the original application that they will abide by the standard licensing conditions codified by rule. The Commission presently imposes conditions in this manner on holders of Section 214 authorizations, including restrictions on types of services authorized for particular routes, reporting requirements, and restrictions on offerings by dominant carriers.[34] While the Commission notes these conditions in the public notices by which it grants Section 214 authorizations, it does not require acceptance letters from successful applicants, or even specify by rule that the conditions will apply unless the successful applicant objects. The substantive and procedural nature of the Commission's standard conditions for holders of Section 214 authorizations indicates that the Commission could also apply standard cable landing license conditions by rule.

Conditions on "Major Suppliers." With regard to the proposal to impose specific conditions on "major suppliers," TyCom urges the Commission to reject this proposal.[35] To the extent that the Commission encounters specific competition problems related to cable station access and backhaul, the Commission has the authority to impose specific conditions. But any such

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33 *See* NPRM ¶ 74.

34 *See* 47 C.F.R. § 63.21 (conditions applicable to all Section 214 authorization holders) § 63.22 (conditions applicable to holders of facilities-based Section 214 authorizations), § 63.23 (conditions applicable to holders of resale-based Section 214 authorizations).

35 *See* NPRM ¶¶ 75-77.

conditions would likely need to be tailored to a particular situation. In any event, such conditions should be imposed sparingly, as the markets for undersea cable capacity and terrestrial interconnection are constantly changing and could make such conditions instantly obsolete. Moreover, submarine cable owners increasingly have an overwhelming incentive to provide non-discriminatory cable station access and facilitate competitive backhaul—as TyCom does—in order to maximize the commercial attractiveness of their facilities and to sell unused capacity. With such incentives, there is less of a need for Commission-imposed conditions.

Order Processing, Delivery, and Reasonability of Charges. Finally, the suggestion that the Commission regulate procedures for the processing of orders and delivery and the reasonability of certain charges is particularly intrusive and threatens to interfere with the basic business decisions of submarine cable owners.[36] These are commercial practices that vary widely among infrastructure providers, and the Commission has neither the expertise to choose "best practices" among them nor the resources to police their implementation. For these reasons, this proposal should be rejected.

[36] *See id.* ¶ 77.

IV. THE COMMISSION SHOULD REQUIRE AS APPLICANTS THOSE ENTITIES NECESSARY FOR ENFORCING THE TERMS AND CONDITIONS OF A CABLE LANDING LICENSE

TyCom supports the Commission's proposal to clarify who should be an applicant for a cable landing license.[37] In deciding who should be an applicant, the Commission should be guided only by the need to enforce its submarine cable rules and the terms and conditions of particular licenses—an approach that is consistent with Commission precedent. The Commission's rules already require the applicants to submit extensive ownership and affiliation information—including a breakdown of ownership (including voting interests) by segment (whether in U.S. or foreign waters or territory or in international waters), regardless of whether or not the owners are U.S. or foreign entities.[38] TyCom sees no need for new or additional information requirements.

Originally, the Commission—under its private submarine cable policy—required only the U.S. joint owners of a submarine cable system to be applicants and licensees.[39] More generally, cable landing license applications—regardless of regulatory classification—have included as applicants all U.S. owners of a submarine cable, and all owners of the U.S.-territory portion of a submarine cable. For consortium cables, the applications have included long lists of U.S. carriers,[40] whereas for non-consortium cables, the practice has been far simpler, with one or two

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37 *See id.* ¶¶ 78-83.

38 47 C.F.R. § 1.767(a)(7).

39 *Tel-Optik*, 100 FCC 2d at 1043-44 (noting that such licensing furthered U.S. objectives in obtaining reciprocal treatment of U.S. carriers and owners by foreign governments).

40 *See, e.g., AT&T et al., Cable Landing License*, DA 99-2042 (Int'l Bur., rel. Oct. 1, 1999) (listing 19 U.S. carriers—out of 54 total owners—as applicants for the TAT-14 cable system).

corporate entities listed as applicants.[41] In at least one case, however, the owners amended their application for a cable landing license to include as an applicant a foreign entity that owned an interest only in the international segment of the submarine cable.[42] The Commission, however, never clarified whether that foreign entity was a necessary applicant.[43]

While the need to achieve reciprocity has waned in the wake of the WTO Agreement on Basic Telecommunications,[44] the Commission's original approach to necessary applicants is still a sensible one. To refine it, the Commission should require only that the parties owning the portion of the submarine cable in U.S. territorial waters be applicants. There is no question that the Commission has jurisdiction over these persons, or that the Commission would be able to take enforcement actions against them should it find that the submarine cable for which they were licensed had failed to comply with the terms and conditions of a cable landing license.

The Commission's specific proposal to include as applicants the landing station owners and entities with 5-percent-or-greater ownership interests would reduce the list of applicants, but not necessarily the ongoing regulatory burdens. Particularly for those submarine cables that sell

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41 *See, e.g., SAm-1 Order* ¶ 2 (listing two Telefónica entities—which directly own 100 percent of the SAm-1 cable network segments and landing stations in the United States—as applicants).

42 *Guam-Philippines Cable Order*, 14 FCC Rcd. at 1925-26 (granting an amendment to add the Guam-Philippines Cable L.P.—which owned 90.52 percent of the international segment of the Guam-Philippines Cable System—to be added as an applicant). This amendment was made to expedite consideration of the application following objections by another party. *Id.*

43 *Id.*

44 *See In the Matter of Rules and Policies on Foreign Participation in the U.S. Telecommunications Market: Report & Order on Reconsideration*, 12 FCC Rcd. 23,891, 23,933-94 (1997) (adopting an open entry policy for applications to land and operate submarine cables from WTO Member countries in the United States and noting that licenses

[Footnote continued on next page]

capacity on an ownership basis, the Commission's rules require new capacity purchaser/owners (or those who go above a Commission-specified threshold) to file amendments to become licensees. Regardless of whether or not it imposes an ownership threshold, however, the Commission should continue to require that new owners of the U.S.-territory portion of a submarine cable apply to become licensees, in order to ensure that the Commission (1) receives current information regarding the ownership and competition issues associated with a particular submarine cable (2) retains the ability to enforce its authorizations.

Finally, TyCom asks the Commission to clarify in its proposal that by "ownership," it means direct ownership of the submarine cable. As noted above, the Commission requires a full disclosure of the ownership of the applicants,[45] and there is no reason to require the indirect owners to be applicants.

V. THE COMMISSION SHOULD CONTINUE TO CONSULT WITH THE DEPARTMENTS OF STATE, COMMERCE, AND DEFENSE TO REFORM THE INTERAGENCY REVIEW PROCESS

In spite of the Commission's best intentions, even the most streamlined Commission review process will not necessarily expedite the licensing of submarine cables that land in the United States. Unlike other facilities licensed by the Commission under the Communications Act, submarine cables are licensed under the Cable Landing License Act of 1921.[46] Pursuant to that

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[Footnote continued from previous page]
could be denied only in "exceptional cases where no conditions would adequately address a very high risk to competition"), *recon. pending*.

[45] *See* 47 C.F.R. §§ 1.767(a)(7), (8), 63.18(h)-(j).

[46] 47 U.S.C. §§ 34-39.

law, President Eisenhower established a cumbersome licensing process.[47] Executive Order No. 10,530 delegates to the Commission the authority to license submarine cables and receive applications therefor, but requires the State Department to consult with the Departments of Commerce and Defense prior to giving its consent to the Commission.[48] And because the Cable Landing License Act vests in the President the power to allow submarine cables to land in the United States, the State Department's consent letter must be authorized by a presidential appointee who has been confirmed with the advice and consent of the Senate.[49] In practice, this procedure entails substantial delays, particularly in the distribution and review of cable landing license applications (which originate at the Commission), the State Department's polling of the three Executive Branch departments for their views, and the collection of the necessary State Department signature from the appropriate presidential appointee.

TyCom urges the Commission to consult further with the Departments of State, Commerce, and Defense to consider how the interagency review process might be expedited. TyCom recognizes that the Commission and the other Executive Branch departments are constrained as a matter of law from making otherwise desirable changes in the review process for cable landing licenses.[50] But TyCom nonetheless believes that many incremental improvements could be made

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47 Executive Order No. 10,530, § 5(a), *codified at* 3 C.F.R. 189 (1954-1958), *reprinted in* 3 U.S.C. § 301 app. (1988).

48 *Id.*

49 3 U.S.C. § 301 (noting that the President may designate and empower the head of any department or agency in the Executive Branch, or any official thereof who is required to be appointed by and with the advice and consent of the Senate, to perform without approval or ratification any function which is vested in the President by law).

50 Although awkward, the interagency review and State Department consent letter requirements of Executive Order 10,530 seek to avoid the questions of delegation authority which

[Footnote continued on next page]

short of a change in the Cable Landing License Act or Executive Order No. 10,530. These improvements might include (1) an expedited process for moving copies of cable landing license applications to the three Executive Branch departments (where by service of copies or electronic filing)[51] and (2) a timetable for review by the Executive Branch agencies. At present, there is no timetable for the reviews conducted by the Executive Branch departments or for the issuance of the State Department's consent letter to the Commission.

By expediting the licensing process, the Commission would reduce its own administrative burden in licensing submarine cables. Due to the present lengthy process, applicants file their cable landing license applications far in advance of the dates by which they actually need those licenses. But these often premature filings necessitate later amendments and separate landing points notifications—which Commission staff must place on public notice and evaluate. Given the frantic pace of mergers, acquisitions, and alliances in the markets for international telecommunications and Internet services, even the mere passage of time requires applicants to revise their filings with the Commission, which in turn consumes Commission resources and adds to the delay in processing.

[Footnote continued from previous page]

Commissioner Furchtgott-Roth has pointed out. *See* NPRM, Dissenting Statement of Commissioner Furchtgott-Roth; Public Statement of Commissioner Furchtgott-Roth re the Licensing of the Japan-U.S. Cable Network (July 9, 1999), <http://www.fcc.gov/Speeches/Furchtgott_Roth/Statements/sthfr932.html>.

[51] For the Executive Branch agencies and interested parties alike, it would be helpful if the Commission could post copies of the applications, amendments, and landing point notifications either on the Commission's web site or to make them available through ECFS.

CONCLUSION

For the foregoing reasons, TyCom urges the Commission to adopt a simplified streamlining of the licensing process for submarine cables.

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Dated: 21 August 2000

CERTIFICATE OF SERVICE

I, Kent D. Bressie, do hereby certify that copies of the foregoing Comments of TyCom Networks (US) Inc. have been sent by first-class mail on this 21st day of August, 2000, to the following:

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